FREQUENTLY ASKED QUESTIONS ON THE BLANKET PRIMARY

Prepared by the Office of the Attorney General
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Questions Related to the Current Lawsuit

Q: How did the current lawsuit over the blanket primary develop?

A: In June 2000, the United States Supreme Court issued an opinion invalidating a form of the blanket primary used in California. *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000) ("*Cal. Dem. Party*"). The Democratic Party, later joined by the Republican and Libertarian Parties, sued in federal court in Tacoma alleging that Washington was precluded, under the Supreme Court opinion, from continuing to use its blanket primary.

Q. What relief did the political parties ask the federal district court to order?

A. In March 2001, the political parties asked the court to order the State to adopt a system in which the political parties would decide which voters would be authorized to participate in a primary election, and to limit those voters to choosing among the candidates of only one party. Further, the political parties asked the court to order the State to record a list of the voters who selected each party's ballot and to provide that list to the parties. The parties also claimed the authority to determine which candidates would be allowed to claim an affiliation with the party.

Q. What was the federal district court's ruling on this request for a court order changing the blanket primary election system?

A. The district court declined to grant the relief that the political parties requested. The district court concluded that even if it found the blanket primary unconstitutional (a question it had not reached at that point), it would be the task of the Legislature, rather than the court, to develop a different primary system. The district court later found that the political parties had not successfully established that the blanket primary was unconstitutional, and the political parties appealed.

Q. What was the ruling of the Ninth Circuit Court of Appeals?

A. In September 2003, a three-judge panel of the Ninth Circuit Court of Appeals reversed the federal district court decision, holding Washington's continued use of the blanket primary unconstitutional. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003). A petition was filed asking for "rehearing en banc" by a larger panel of judges, but the petition was not granted and the decision of the three-judge panel became the final Ninth Circuit opinion.

Q: What is the current status of litigation regarding the blanket primary?

A: On November 25, 2003, the Attorney General's Office, representing Secretary of State Sam Reed, filed a Petition for Writ of Certiorari asking the United States Supreme Court to hear the case. The decision on whether the Supreme Court will hear the case will likely be made in February or March 2004, depending on how quickly other parties to the case file their petitions or responses.

Q: If the Supreme Court declines to hear the case, what happens next in the lawsuit?

A: If the Supreme Court denies review, the Ninth Circuit opinion would be the "final word" invalidating the blanket primary. The Ninth Circuit's opinion orders that the case be remanded to the district court in Tacoma to enter a judgment declaring the blanket primary invalid and to enter an injunction in favor of the challengers.

The Ninth Circuit did not instruct what an injunction should say. An injunction might simply state that the blanket primary is unconstitutional and order the State not to use that system to conduct primaries in the future. Earlier in this litigation the political parties asked the court to issue an injunction directing how future primaries should be conducted. The district court, in July 2001, declined to determine how future primaries should be conducted. The court explained, "Repeal or modification of the election statutes is something in which this Court will not engage, as that is a legislative function. . . . It is not for this court . . . to determine political policy, to select from among the various alternatives, or to impose its own ideas. It is the business of the legislature to resolve the competing interests and to decide whether to amend or repeal the current election laws." It is not clear what the parties will ask for on remand.

Questions Related to the Ninth Circuit Decision

Q: What reasons did the court give for holding the blanket primary unconstitutional?

A: The Ninth Circuit held that the political parties' right to freedom of association under the First Amendment includes the right to determine their nominees for public office without participation by non-members of the parties. The Ninth Circuit reasoned that the blanket primary violates this right because it forces the political parties to permit people who are not "members" of the party to participate in selecting the party's nominees. The Ninth Circuit ruled that the system used in Washington is "materially indistinguishable" from the California system.

The Secretary of State (through the Attorney General) and the Washington State Grange argued that Washington's primary election system is different from California's system because it is not an election to nominate the party's standard-bearers for public office. Rather, Washington's system allows the voters to select among candidates who identify their party affiliation, but do not become the political party's nominee. However, the

Ninth Circuit found that Washington's system selects political party nominees for office, and violates the freedom of association of the political parties.

Q: What are the features of the blanket primary that the court considered in reaching its conclusion?

A: Washington's blanket primary does two things at the same time. First, it permits every voter to choose from among all the candidates for every office at the primary, including the ability to vote for a candidate of one party for one office and a candidate of a different party for a different office. Second, it guarantees that one candidate of every major party will qualify for the general election ballot. This latter feature persuaded the Ninth Circuit that Washington's primary is a party nominating system. The combination of these two features, rather than either one of them by itself, is the basis of the Ninth Circuit decision. This suggests that the Legislature could choose to retain one or the other feature of the blanket primary, but not both.

Q: If the Ninth Circuit decision stands, what are the implications for structuring a blanket primary that satisfies the First Amendment?

A: A blanket primary would not be allowed under the Ninth Circuit decision if it contained *both* of the following features: (1) a voter has the option of casting votes for candidates from different political parties in different races; and (2) the candidates that proceed to the general election are the top "vote getters" among candidates affiliated with each political party.

Q: Does the decision limit the ability of voters to vote for any candidate of their choice at the general election?

A: No. The issues in litigation only involve the primary. Voters remain free to vote for any candidates they choose at the general election in November. This includes the ability to vote for a candidate of one party for one office while still voting for a candidate of a different party for other offices.

Q: Does the Ninth Circuit decision affect the constitutionality of primary elections for nonpartisan office?

A. No. The Ninth Circuit opinion does not apply to primary elections involving nonpartisan offices, where party affiliation does not appear on the ballot and would not be a factor in determining which candidates would qualify for the general election ballot. This includes judicial offices and many local offices, as well as the superintendent of public instruction. Primary nominations for nonpartisan offices also do not present the constitutional issues raised in the litigation because the primaries for these offices clearly are not designed to produce party nominees.

Questions Related to Alternatives to the Blanket Primary

Q: What are the alternative primary election systems that other states have adopted?

A: Other states have developed different primary systems, which vary depending on each state's view of the purpose of a primary election. Most states consider the primary election as the method for selecting the nominees of political parties, while one state (other than Washington) uses the primary as a means to narrow the choices for the voters at the general election.

In states where the primary election is for the purpose of selecting party nominees, voters select the ballot of a single party. Voters cannot "cross over" at the primary and vote for candidates of different parties for different offices. For each race on the ballot, the political party's nominee is the candidate who receives the most votes among candidates appearing on that political party's primary ballot.

These types of primary elections are categorized generally as a "closed primary" or an "open primary." While there are variations of each system, a "closed primary" generally allows only voters affiliated with a political party to vote, and then only for candidates of that party. Some states require formal party affiliation, such as party registration, while others have allowed less formal acts of party affiliation. In an "open primary", a voter does not have to formally affiliate with a political party but is limited to one party's ballot in any given primary.

There are variations in how states administer this type of primary. These include (1) whether voters formally register their party preferences; (2) with no party registration, whether a record is made of a voter's choice of party ballot in a given election, and who has access to this record; (3) how minor party and independent candidates qualify for the general election ballot; and (4) whether, and to what extent, each political party is allowed to choose to conduct a primary election that varies from the basic pattern.

Besides Washington, there is currently only one state that does not use its primary as a party nomination process. Louisiana uses its primary election to winnow the field for the general election, and not to select party nominees. Voters may choose candidates from any party, regardless of affiliation. Under such a system, all of the candidates appear on a single ballot and voters are allowed to choose from among all candidates for each office, and are not limited by party affiliation. The two candidates who receive the most votes then advance to the general election, regardless of party affiliation. (In other words, this system makes it possible that the two candidates on the general election ballot are of the same party, although this is not a frequent occurrence in Louisiana.)[1]

Q: Have the courts determined whether these primary election systems used by other states meet constitutional requirements?

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[1] An additional feature of Louisiana's primary is that a candidate receiving a majority (50%) of the vote in the primary is declared elected, with no "runoff" or general election contest conducted for that position. This is not a constitutionally required feature of the system.

A: Each of these election systems discussed above—by eliminating the "party nomination" feature or clearly moving to a party nominating process—address the constitutional objections which have been raised against the current blanket primary. Courts have not resolved all of the issues regarding other forms of primary elections. While the United States Supreme Court has not directly ruled on the constitutionality of each of these election systems, it has distinguished these systems from California's blanket primary system. The Court noted that the blanket primary system is "qualitatively different from a closed primary". Similarly, the Court noted that its decision on the California blanket primary did not address the different question of whether an "open primary" is constitutional. In December 2003, the Ninth Circuit returned a lawsuit challenging Arizona's primary to the trial court for further consideration of whether that state's system is constitutional, in light of the fact that it permits independents and minor party members to vote in major party primaries.

With regard to the Louisiana system, where the candidates receiving the most votes advance to the general election regardless of party affiliation, both the United States Supreme Court and the Ninth Circuit have acknowledged the option of adopting such a system. The Supreme Court stated:

> This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness" -- all without severely burdening a political party's First Amendment right of association.

Cal. Dem. Party, 530 U.S. at 585-86.

Q: What would happen if the Legislature did not enact an alternative primary election system and the courts ultimately held the current blanket primary unconstitutional?

A: It is unclear how, or whether, a primary would be conducted if the Legislature does not enact an alternative. We see several possibilities.

- One possibility is no primary may be conducted at all, with all candidates simply certified directly to the general election ballot. In such a system, there might be dozens of candidates on the ballot for some offices, and the winners of some races could be determined by a small plurality of votes.

- Another possibility is that the law in place prior to the enactment of the blanket primary in 1935 would be reinstated. Under that system, voters were limited to choosing the ballot of one party, but if anyone raised a challenge as to whether the

voter was a member of that party the voter would be required to take an oath of affiliation with the party. Laws of 1907, ch. 209, § 12. The law did not mention collecting lists of the voters who selected each ballot, but contemplated a public request for a ballot in order to facilitate the challenge procedure. The prior law did not describe how this process would work for absentee ballots, including whether any public record of a choice of a particular party's ballot would be necessary, because absentee ballots were not developed until later. The 1935 law establishing the blanket primary superseded this system. Any attempt to reinstate this system would create a number of implementation questions because of other intervening election law changes that create confusion regarding how to use such a system today.

- The political parties may renew the request that the federal district court develop a primary election system. As noted above, in past rulings the district court said it was the task of the Legislature, rather than the court, to develop a different primary system.

Q: Would the Secretary of State have the authority to adopt administrative rules that determine the manner in which future primary elections are conducted if there is no new legislation on the subject?

A: The Secretary of State's rulemaking authority would not allow the Secretary of State to design an alternative system for conducting primaries by adopting administrative rules. The statutes authorize the Secretary to adopt rules that augment a statutory scheme, rather than rules that replace a statutory scheme. RCW 29A.04.610. If a void is left in the law because a statute is ruled unconstitutional, the courts will generally apply rules of statutory construction to interpret the statutory structure that remains in place, rather than allowing an executive officer to assume a legislative function of designing a new primary system. The court has described it as a "fundamental" rule that the Legislature's power to make laws cannot be delegated. The Legislature can generally define what is to be done and what executive officer is to do it, but executive officers cannot fill a void in the law when the Legislature has not provided that direction. The Secretary of State could have the rulemaking authority to fill in interstices of law or carry out the Legislature's specified purposes once the Legislature provides a sufficient level of direction regarding what is to be done, but these purposes cannot be defined by rulemaking.

We are aware that the Alaska Supreme Court upheld emergency election rules adopted in that state, describing the election official's power as "authority to regulate on a temporary basis in an emergent situation like the situation we face here." That situation, however, was significantly different than the current situation in Washington. The Alaska Court noted that the primary was scheduled to occur less than two months after the decision of the United States Supreme Court, and that the Legislature would not reconvene until long after the primary was scheduled. In contrast, the Ninth Circuit's decision was issued approximately one year before the next scheduled primary in Washington. The Legislature is scheduled to convene in regular session well in advance of the next scheduled primary. Thus, the decision on how the election would proceed would be

based upon judicial interpretation of the statutory scheme the Legislature left in place. The Secretary of State's rulemaking authority would be limited to the details necessary to carry out this statutory scheme. If the judicial interpretation of the statutory scheme resulted in the conclusion that the system that existed prior to 1935 would apply, the Secretary's rulemaking authority may extend to providing details necessary to enable election administrators to implement such a system.

Q: Can the political parties choose, independently of the Legislature, the manner in which their candidates are nominated, such as by specifying how to conduct a primary or by nominating candidates by convention?

A: No, the political parties do not have complete discretion to determine the nominating process or to demand changes to a system adopted by the Legislature. The Supreme Court has held that states can require party nominations to take place by primary, as opposed to through a convention or caucus system. A determination on the constitutionality of a particular system would involve consideration of both the parties' rights and important state interests served by the law. No court has held that if the state requires nominations to take place by a primary that the parties have the right to choose precisely how the primary will be conducted. The Supreme Court has held that, where a state restricts voting at the primary to registered party members, parties have the right to open it to participation by independents. The Court has also held, of course, that parties can object to a blanket primary that selects the party's nominee. The courts have not addressed other features of primary systems.

If the Legislature determines that the primary should be a process for winnowing the field of candidates for the general election instead of using it to select party nominees, then the parties' rights are not implicated and the Legislature has greater latitude in designing the features of that process. No court has held that political parties have the right to determine which candidates shall appear on the ballot through a nominating convention or through restrictions on the use of the party name, although the Legislature could authorize these elements as part of the election system by statute.

Q: Can the political parties hold nominating conventions absent legislation providing for such conventions?

A: Yes, but those conventions have no effect on determining which candidates appear on the primary or general election ballots unless the Legislature enacts a law giving convention nominations such an effect. The political parties are free to hold conventions at which they nominate or endorse candidates for office, and the state could not constitutionally prohibit them from doing so. No court has held that a state is required to give such nominations any effect in terms of determining which candidates will appear on the ballot or in what manner they will appear. State law does not currently provide for party nominating conventions to have any effect as to these matters.

For further information contact:
Senior AAG James Pharris at 360-664-3027 or AAG Jeffrey Even at 360-586-0728